FILED
APR 27 1988
JOSEPH F. SPANIOL
CLERK

No. 87-1598 (4)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

NORTHERN GROUP SERVICES, INC., et. al.,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et. al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari on an ERISA pre-emption claim, where the state coordination of benefits law at issue is unique to Michigan, and where there is no conflict among the circuits as to whether a state's coordination of benefits rules are pre-empted by ERISA?

2. Should this Court review the Sixth Circuit's decision concerning the meaning of ERISA's deemer clause when the Michigan no-fault coordination of benefits law does not even relate to or regulate ERISA plans to such an extent as to come within the ERISA's initial pre-emption clause?

3. Should this Court decide academic issues concerning pre-emption where even if the state law for resolving coordination of benefits conflicts were pre-empted, a federal common law rule would have to be fashioned on the basis of state law, and the federal common law rule would subject the ERISA plans to the same alleged economic and administrative burdens as the state rule?

4. Should this Court grant certiorari where the pre-emption issues raised in the petition are irrelevant since the petitioners' plans expressly incorporated Michigan law?

STATEMENT OF CORPORATE AFFILIATES, PARENTS, AND NOT-WHOLLY-OWNED SUBSIDIARIES

ALLSTATE INSURANCE COMPANY

Parent: Sears, Roebuck and Company

Affiliates and Subsidiaries: Allstate Insurance Company of Canada; Allstate Life Insurance Company of Canada; Armtek Corporation; Sears Canada, Inc.; Sears Acceptance Company Inc.

AUTO OWNERS MUTUAL INSURANCE COMPANY

None

CITIZENS INSURANCE COMPANY OF AMERICA

Parent: The Hanover Insurance Company

Affiliates: Massachusetts Bay Insurance Company; Beacon Insurance Company of America; California Compensation and Fire Company

Subsidiary: AMGRO, Inc.

MICHIGAN MUTUAL INSURANCE COMPANY

None

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Subsidiary: State Farm County Mutual Insurance Company of Texas

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SUMMARY OF ARGUMENT

For several reasons, the Court should not accept this case for review.

First, the Sixth Circuit was correct in ruling that Michigan's law for resolving conflicts between coordination of benefits clauses should apply to ERISA plans. Nothing in ERISA conflicts with the Michigan law or its goals of reducing the cost of compulsory auto insurance and containing health care costs.

Second, there is no conflict among the circuits — no court has held that state rules for resolving coordination of benefits conflicts are pre-empted by ERISA. Nor does the case have any impact beyond Michigan. The Michigan no-fault coordination of benefits law is unique, and the Sixth Circuit carefully circumscribed its decision based on the particular circumstances of this case. It would make very little difference if this Court decided the case. Even if the state rule is pre-empted, the courts will have to fashion a federal common law rule of accommodation when there are intractable conflicts between coordination of benefits clauses. Any federal rule will borrow heavily from established state law which, at the very least (without even considering §3109a of the Michigan No-Fault Act and *Federal Kemper*), would require benefit plans to share primary liability. ERISA plans will still have to pay more than their coordination provisions say they will pay. So the pre-emption issue is much ado about nothing.

Third, while the petition contends that the deemer clause issue is deserving of this Court's review, there are at least two alternative grounds for affirmance. First, the same result could be reached because the Michigan law at issue does not come within the scope of ERISA pre-emption as a threshold matter — it does not purport to regulate ERISA plans and it only affects them tangentially. Second, the plans contain express contract provisions agreeing to be governed by Michigan law, an issue which the Sixth Circuit did not consider because it was not necessary to its disposition of the case. Petitioners now claim that applying Michigan law would cause all sorts of problems for them, but the

petitioners' plans expressly provide that they are to be interpreted by Michigan law.

In the last few years this Court has repeatedly had to revisit 29 U.S.C. §1144 to decide questions of ERISA pre-emption.[1] This Court should not be asked to review every state law which in some way touches an ERISA plan and iron out every conceivable wrinkle involving pre-emption. The case at bar is particularly inappropriate for Supreme Court review.

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[1]*Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. _____; 107 S.Ct. 2211; 96 L.Ed.2d 1 (1987); *Pilot Life Ins. Co.* v. *Dedeaux*, _____ U.S. _____; 107 S.Ct. 1549; 95 L.Ed.2d 39 (1987); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724; 105 S.Ct. 2380; 85 L.Ed.2d 728 (1985); *Shaw* v. *Delta Airlines, Inc.*, 466 U.S. 85; 103 S.Ct. 2890; 77 L.Ed.2d 490 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504; 101 S.Ct. 1895; 68 L.Ed.2d 402 (1981).

ARGUMENT

A. THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners suggest that review is warranted because the Sixth Circuit decision is inconsistent with pre-emption decisions of other circuits. Petition pp. 7, 13. However, *none* of the cases cited involved coordination of benefits provisions or state rules to resolve contests when there is duplicate coverage. *There simply is no conflict among the circuits about how to treat coordination of benefits under ERISA.* Indeed, the only other circuit to consider the issue ruled that a state rule for resolving coordination of benefits conflicts was *not* pre-empted. *Employers Ass'n of New Jersey* v. *New Jersey*, 601 F.Supp. 232 (D. N.J. 1985), *aff'd mem.*,774 F.2d 1151 (3rd Cir. 1985).

In the absence of any direct conflict among the circuits in cases involving a similar issue, petitioners rely on an apparent inconsistency in the theory enunciated by some other courts. While some decisions from other circuits have employed an interpretation of the deemer clause focussing simply on whether the plan is insured or not, none of the cited cases considered the question the Sixth Circuit addressed: whether there might be exceptions or qualifications to the deemer clause, and whether uninsured plans are immune from *all* state insurance laws. The other courts were not faced with a compelling situation like the one in this case involving powerful state interests testing the limits of the deemer clause. In other words, although the analysis used by the Sixth Circuit may have differed from the theory expressed in the cited cases, the results in these cases can be harmonized. Applying the Sixth Circuit balancing test to the fact situations in the cited cases, the Sixth Circuit might very well arrive at the same result — the laws would be pre-empted. And if the other circuits were faced with the case at bar, they might very well reach the same result and conclude that the deemer clause in some circumstances allows application of insurance rules to uninsured plans.

Petitioners casually suggest that the Sixth Circuit "directly repudiated this Courts' [sic] numerous decisions that any state law mandating benefits should be pre-empted." Petition p. 9. The Sixth Circuit of course did not "directly repudiate" any decision of this Court. Moreover, this case does not involve a mandated-benefit law. Finally, this Court unanimously held in *Metropolitan Life* that mandated benefit laws were *not* pre-empted where they were insurance regulations within ERISA's savings clause.

Petitioners do not seriously contend that the Sixth Circuit decision conflicts with any decision of this Court. Quite correctly, the Petition does not argue that the Sixth Circuit decision conflicts with *Metropolitan Life*. There the Court held that when a state insurance law is at issue, "[t]he presumption is against pre-emption." 471 U.S. at 741. As the Sixth Circuit noted, this Court did not render a definitive interpretation of the deemer clause in *Metropolitan Life*. *Northern Group Services, Inc.* v. *Auto Owners Ins. Co.*, 833 F.2d 85, 90-91 (1987). Because *Metropolitan Life* did not reach or involve any issue concerning the deemer clause, the Court's comment about what the deemer clause might mean was *obiter dicta*. Moreover, as the Sixth Circuit noted:

> Nor is this approach necessarily inconsistent with the dicta in *Metropolitan Life* concerning insured versus self-insuring plans. 471 U.S. at 740-41, 747, 105 S.Ct. at 2389-90, 2393. We preserve a distinction between insured and self-insuring plans. Insured plans would be *per se* "open to indirect regulation." *Id.* at 747, 105 S.Ct. at 2393. Self-insuring plans would be subject to state regulation only when no independent federal interest in national uniformity exists to inform and guide the creation of federal common law.
>
> *Id.* at 94-95 (citations omitted).

B. PETITIONERS MISCHARACTERIZE THE SIXTH CIRCUIT DECISION; THE DECISION WAS NARROW AND CLOSELY TIED TO THE PARTICULAR SITUATION PRESENTED IN THIS CASE

To grab this Court's attention, the petition misrepresents the Sixth Circuit's holding and exaggerates its implications. The Sixth Circuit's exceptionally thorough, well-reasoned opinion is the best refutation of the petitioners' claims.[2]

Apparently concluding that only by enormous overstatement could they make it appear that this case is significant enough for this Court to hear, petitioners assert that "the Sixth Circuit virtually destroyed the effect of ERISA pre-emption and permits [sic] virtually complete state regulation of all ERISA plans." Petition p. 11. The Sixth Circuit opinion does not in any way touch upon the general pre-emption of most state laws or allow "virtually complete" state regulation of ERISA plans — it only applies to state *insurance* laws, and even then narrowly holds that only *some* insurance laws can be applied to uninsured plans.

Petitioners allege that the Sixth Circuit opinion runs counter to the central purpose of pre-emption: national uniformity of plan regulation. But Congress enacted the savings clause which expressly sanctifies and preserves state insurance laws, despite the prospect of differing insurance regulations from state to state affecting ERISA plans. As this Court recognized in *Metropolitan Life:*

> Such disuniformities, however, are the inevitable result of the congressional decision to "save" local insurance regulation. Arguments as to the wisdom of these policy choices must be directed at Congress.
>
> 471 U.S. at 747.

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[2]In response to the decision, petitioners moved for rehearing and rehearing en banc, raising the same arguments they now assert in their certiorari petition. The panel which issued the opinion rejected these arguments and denied the petition for rehearing. Notably, not a single Sixth Circuit judge requested a vote on the petition for en banc rehearing. Order Dec. 30, 1987.

Congress expressly determined that preserving state insurance laws (even insofar as they affect ERISA plans) is *more important* than the interest in national uniformity.

Petitioners also assert that the Sixth Circuit decision has the effect of "voiding" the deemer clause. Petition p. 12. Of course, the Sixth Circuit emphasized the narrowness of its holding; only to a "limited degree" would self-insured plans be affected by certain state insurance laws. 833 F.2d at 95. Using the Sixth Circuit's balancing approach, the deemer clause would still immunize self-insured plans from most insurance laws, *i.e.* where the state's purpose is to regulate the content of ERISA plan benefits, or where there is some federal policy or interest to inform and guide the creation of federal common law, or where application of a federal rule would not substantially disrupt a complex regulatory scheme of benefits coverage. *Id.* at 93, 95. The Sixth Circuit did not purport to announce any categorical rule applicable to other settings. The impact of its holding is quite limited.

The Sixth Circuit decision was closely wedded to the particular features of the Michigan law at issue and the special policies behind it. The court emphasized the particular circumstances of the matrix of overlapping insurance programs and the need for a uniform rule to apportion liability, plus the unique aspect of compulsory no-fault insurance. *Id.* at 93-94. What distinguishes this from other pre-emption cases is that exempting uninsured plans would substantially disrupt the state's uniform scheme of no-fault coordination of benefits law, while there is no discernible federal interest with regard to coordination of benefits. Id. at 94.

C. MICHIGAN'S RULE FOR RESOLVING COORDINATION OF BENEFITS CONTESTS WHEN NO-FAULT IS INVOLVED IS UNIQUE; REVERSING THE SIXTH CIRCUIT'S DECISION WOULD HAVE LITTLE IMPACT SINCE EVEN IF STATE LAW WERE PREEMPTED THE CONSEQUENCES FOR ERISA PLANS WOULD BE THE SAME

Under the singular Michigan law at issue here, when there is a conflict between competing coordination of benefits provisions in a Michigan no-fault policy and other applicable benefit coverage, for reasons of public policy the no-fault provision must be given effect and no-fault only has to provide benefits if and when the other coverage is exhausted. Because the Michigan no-fault statute is virtually unique, the implications of the Sixth Circuit's ruling do not extend beyond Michigan. It leaves things exactly the same for plans in other states which do not have such a law. Even for the petitioners the consequences are essentially the same regardless of whether the Michigan rule on coordination of no-fault benefits is pre-empted.

If the Michigan rule for resolving coordination contests between no-fault and other coverage is pre-empted, some other rule must be found to take its place, since the no-fault policies and the ERISA plans have incompatible provisions each denying primary liability because of the other coverage. (Based solely on the documents defining the coverage obligations, absent some external principle for allocating liability, a claimant would end up with two secondary coverages and no primary coverage.) So, if state law is pre-empted, the courts must devise a federal rule to reconcile the conflict.

The federal statute does not supply a rule. ERISA "does not regulate the substantive content of welfare benefit plans," *Metropolitan Life*, 471 U.S. at 732, and there is nothing in the legislative history about coordination provisions or rules to resolve conflicts when there is duplicate coverage. So the courts would have to develop a federal common law rule. *Northeast Dept. ILGWU Health & Welfare Fund* v. *Teamsters Local Union No.*

229 Welfare Fund, 764 F.2d 147, 158 (3rd Cir. 1985) (fashioning federal common law rules with regard to conflicting coordination of benefits clauses in ERISA plans). Given the absence of any federal policy in this area, the courts would inevitably adopt a federal rule based on general state law. *Northeast Dept. ILGWU,* 764 F.2d at 159-162; *Northern Group,* 833 F.2d at 94. Under general insurance law (without considering §3109a and *Federal Kemper*), when there are mutually repugnant coordination clauses, the courts invariably apportion primary liability on a pro-rata basis. *See* 8A Appleman, *Insurance Law & Practice* §4906-09; *Federal Kemper Ins. Co., Inc.* v. *Health Insurance Admin., Inc.,* 424 Mich. 537, 542-543; 383 N.W.2d 590 (1986); *Northeast Dept. ILGWU,* 764 F.2d at 161 n. 13; *Blue Cross & Blue Shield of Kansas, Inc.* v. *Riverside Hosp.,* 237 Kan. 829; 703 P.2d 1384 (1985).

In short, resolution of the pre-emption issue would not make any substantial difference. Taking this case would be a fruitless academic exercise, since even if the Court ultimately found the Michigan no-fault coordination rule pre-empted, the federal common law rule would inevitably be patterned after the general state rule. Since the majority common law rule (without considering §3109a and *Federal Kemper*) would at the very least require ERISA plans to pay a pro-rata portion of the benefits, *even if there is pre-emption,* ERISA plans will have to share primary liability.

The Petition assumes that if the state rule is pre-empted, then the conflict of coordination clauses must necessarily be resolved in favor of the ERISA plans: the coordination clauses in the no-fault policies must be disregarded and no-fault will be primarily liable. However:

> It must be kept in mind that preemption is *not* fatal in these cases. Preemption simply means that federal, rather than state law governs the conduct at issue.

> Sherrick, *ERISA Preemption: An Introduction*, 64 Michigan Bar Journal 1074, 1081 (October 1985) (emphasis in original).

See also, Holliday v. *Xerox Corp.*, 555 F.Supp. 51, 55 (E.D. Mich. 1982); *aff'd*, 732 F.2d 548 (1984); *cert. denied*, 469 U.S. 917 (1984) ("if the state law is preempted, then the contract must be construed in accordance with federal law, in this case the federal common law of contract . . . Preemption would not make the contract a nullity"). There is nothing in ERISA to suggest that Congress intended to invalidate any insurance policy provisions or to require that no-fault insurers provide primary benefits contrary to the terms of their policies. *Especially in view of the insurance savings clause, ERISA clearly does not permit provisions of insurance policies to be cavalierly disregarded or nullified.*

D. THE PETITIONERS' PLANS SPECIFICALLY PROVIDE THAT MICHIGAN LAW IS CONTROLLING

Even if the state rule were pre-empted, and even if the deemer clause absolutely insulated uninsured plans from every state insurance law (no matter how powerful the policies favoring application of that law), the plans are still bound by their contract provisions which expressly incorporate Michigan law.

Because the result in this case is fully justified on this alternative ground, it is unnecessary to reach the issues trumpeted in the petition as warranting review. Even if the Court were inclined to consider the deemer clause issue in a proper case, here that issue is purely academic.

All of the plans involved in this case have provisions expressly agreeing to be bound by Michigan law:

> The Plans shall be interpreted under the laws of Michigan.
>
> R. 56 Ex. 5 (Jt. App. 311) (Highland Plan).
>
> Any provision of the Plan which is in conflict with any applicable law or regulation of the State in which the Plan is

> delivered shall be considered amended so as to conform to the requirements of such law or regulation.
>
> Alcott Dep. Ex. 8 (Jt. App. 717) (Masco Plan).
>
> To the extent not inconsistent with Federal law the Plan shall be interpreted under the laws of Michigan.
>
> R. 52 Ex. C (Jt. App. 250) (Masco Plan).[3]

By their own choice, the petitioners' coordination of benefits clauses *must be construed and enforced according to Michigan law.* It is axiomatic that ERISA plans, and their administrators and fiduciaries, are bound by the terms of the plan documents, 29 U.S.C. §1104(1)(D). Very simply, *the plan is a binding contract with the participants, so the petitioners are not at liberty to abandon or ignore the choice-of-law clause at their whim.*

Petitioners argue that ERISA's pre-emption clause entitles them to disregard their own choice-of-law provisions. But ERISA's pre-emption clause does not change the rule that a choice-of-law provision is binding. Restatement (Second) of Conflicts §187. If state law is pre-empted, it is replaced by federal common law. Federal common law would apply the universal rule that a choice-of-law provision must be enforced.

Previously, petitioners cited a footnote in *Children's Hosp.* v. *Whitcomb,* 778 F.2d 239, 242 n. 1 (5th Cir. 1985), to try to escape their voluntary choice-of-law provisions. There, the court cursorily dismissed the contention that a choice-of-law provision meant that state law was not pre-empted. However, the argument here is not that pre-emption is waived or that pre-emption does not apply, but rather than *even if* ERISA pre-empts the Michigan

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[3]There has never been any factual development in this case which might shed light on the exact meaning of these provisions — each of which is worded slightly differently, but each of which clearly incorporates Michigan law to some degree. There is no testimony about the intent of the drafters, or the reasonable understanding of the plan participants. Nor did either the district court or court of appeals make any findings or interpretation of the provisions. (The Sixth Circuit never addressed the choice-of-law issue at all.) This is yet another reason why this case is not appropriate for Supreme Court review.

coordination rule, the plan documents must be enforced under federal law. Federal common law, applying general rules of contract interpretation, will enforce the provisions in the petitioners' plans stipulating that they are to be interpreted according to Michigan law.

Giving effect to a choice-of-law provision in an ERISA plan does not violate pre-emption. *Pre-emption only means that state rules cannot be imposed on plans* from the outside, that a state cannot force a plan to follow state law. The plans in this case *chose* to incorporate state law. The state is not imposing any requirements on ERISA plans, so pre-emption is given full force and effect. There is no state interference with an ERISA plan, because the plans dictated their own terms and voluntarily incorporated state law.

This is not a general waiver of ERISA pre-emption. The plans have not stipulated that state laws will apply instead of federal law; they have stipulated that the *Michigan* law applies. The plans did not consent to be governed by inconsistent laws of the several states; they deliberately chose to be interpreted according to the law of a single state to make plan administration simple and certain. The petitioners' choice-of-law provisions provide a single clear standard of reference for interpreting their plans' terms.

There is simply no federal policy or interest in disregarding the voluntarily-chosen provisions of an ERISA plan. Federal law is silent as to what provisions a plan should have, and leaves the parties free to work out their own terms. Far from prohibiting plans from choosing state law, the policies behind ERISA pre-emption *support* such choice-of-law provisions, according to petitioners' own explanation of the purposes of pre-emption. The plans are not subject to a multiplicity of inconsistent state regulations, because the petitioner plans chose to be bound by the law of a single state; so there is complete uniformity of regulation. Indeed, Michigan law affords a more definite and predictable legal context for the operation of the plans than the as yet undefined rules which may be devised under the federal common

law of ERISA. Petitioners further suggest that one of the foremost federal policies underlying ERISA is that the parties to a plan must be allowed to determine and define the terms of the plan. Petition pp. 9, 18. *That is precisely why their decision to abide by Michigan law must be respected.*

In short, petitioners cannot disavow their choice-of-law provisions on the pretext that these provisions negate federal pre-emption. Even if state law is pre-empted, federal common law would come into play, and federal common law will give effect to the plans' deliberate choice to be interpreted under Michigan law.

E. THE MICHIGAN LAW DOES NOT COME WITHIN THE THRESHOLD SCOPE OF ERISA PRE-EMPTION

Although the Sixth Circuit decided the case on the basis of the savings clause exception, the result is fully supportible on the alternative ground that the Michigan coordination of benefits law does not come within the scope of ERISA pre-emption in the first place.

It is firmly established that not all state laws with an impact on ERISA plans are pre-empted. ERISA does not pre-empt all state laws that "relate to" employee benefit plans, 29 U.S.C. §1144(a). It only pre-empts state laws that relate to employee benefit plans in a way that is more than "tenuous, remote, or peripheral," *Shaw*, 463 U.S. at 100 n. 21. Moreover, state laws are only pre-empted if they "purport to regulate, directly or indirectly, the terms and conditions of employee benefit plans," 29 U.S.C. §1144(c)(2). *See, Rebaldo* v. *Cuomo,* 749 F.2d 133, 137-139 (2d Cir. 1984); *cert. denied,* 472 U.S. 1008 (1985); *Lane* v. *Goren,* 743 F.2d 1337, 1339 (1984); *cert. denied,* 474 U.S. 888 (1985); *Martori Bros. Distributors* v. *James-Massengale,* 781 F.2d 1349, 1356-1359 (9th Cir. 1986); *cert. denied,* 107 S.Ct. 435 (1986).

Michigan's no-fault coordination of benefits rule does not purport to regulate ERISA plans and it only tangentially affects them. As the court concluded when faced with this precise issue

in *Physicians Health Plan, Inc.* v. *Citizens Ins. Co.*, 673 F.Supp. 903, 906-907 (W.D. Mich. 1987), "the Court finds 3109a is not sufficiently related to plaintiff's employee benefit plan to trigger ERISA pre-emption." Also, in *Employers Ass'n of New Jersey* v. *New Jersey*, 601 F.Supp. 232, 239-240 (D. N.J. 1985), *aff'd mem.*, 774 F.2d 1151 (3rd Cir. 1985), the court held that a strikingly similar New Jersey law was not pre-empted by ERISA. The court noted that, "[n]othing in the New Jersey statute challenged herein mandates that employers provide health benefits for their employees . . . The challenged portions of the New Jersey law are not directed at employee benefit plans or trust funds."

The Michigan no-fault coordination of benefits law is not aimed at ERISA plans, nor does it deal with any subject regulated by ERISA.[4] The Michigan law at issue is concerned with no-fault automobile insurance, not employee benefit plans. It does *not* require employee benefit plans to provide coverage for automobile accidents or even to provide health benefit coverage at all. Its effect on coordination clauses in health plans is purely incidental. In addition, the law affects the plans' relations with third parties (no-fault insurers); it does not affect the plans' relationships with their participants, fiduciaries or sponsoring employers. *See, Sommers Drug Stores Profit Sharing Trust* v. *Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986); *cert. denied*, 107 S.Ct. 884 and 1298 (1987); *Firestone Tire & Rubber Co.* v. *Neusser*, 810 F.2d 550 (6th Cir. 1987).

In short, §3109a does not materially "relate to" or "purport to regulate" ERISA plans, and so it is not pre-empted.

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[4]As this Court recently observed of ERISA pre-emption,

> If a State creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local social and economic problems.
>
> *Fort Halifax Packing Co., Inc.* v. *Coyne*, 482 U.S. ___; 107 S.Ct. 2211; 96 L.Ed.2d 1, 16 (1987).

F. THE HIGHLAND PLAN IS CLEARLY INSURED

As shown in this brief, regardless of whether the petitioners' plans are insured, there are several reasons why they must be interpreted according to Michigan coordination of benefits law. The Sixth Circuit additionally decided that the Highland Plan *is* insured, so it remains subject to Michigan insurance law under the savings clause. Petitioners suggest that this marginal, subsidiary issue warrants review because the Sixth Circuit's conclusion is at odds with the Ninth Circuit.

The Sixth Circuit previously held that an ERISA plan with stop-loss insurance is an insured plan and subject to state insurance laws under *Metropolitan Life. Michigan United Food & Commercial Workers Union* v. *Baerwaldt*, 767 F.2d 308 (6th Cir. 1985); *cert. denied*, 474 U.S. 1059 (1986). *This Court declined to review the decision in Baerwaldt.* The Sixth Circuit here followed *Baerwaldt* because the Highland Plan has stop-loss insurance similar to that in *Baerwaldt*. The two Ninth Circuit cases cited by petitioners did not even cite or mention *Baerwaldt*. Moreover, the Ninth Circuit cases involved *only aggregate insurance*, not the *individual* insurance at issue in *Baerwaldt* and in the present case. Here, the insurance pays specific benefits for specific beneficiaries when the stated individual deductible is reached.

Petitioners argue that the Highland Plan is not insured because the Plan's sponsor, Highland Appliance Company, rather than the Highland Plan itself, technically purchased the insurance. This Court has already flatly rejected petitioners' approach. In *Metropolitan Life*, the Court expressly noted that most of the insurance contracts relating to the plans at issue "technically were issued to employers." 471 U.S. at 738 n. 15. Nevertheless, those insurance plans were held subject to state insurance law. Moreover, the District Court in the case at bar found as a matter of fact that Highland's insurance was "acquired by the Highland plan." R. 69 (Jt. App. 22). As the Sixth Circuit correctly noted in the case at bar, the petitioners' shell games to separate Highland Appliance Company from the Highland Plan are without merit because "[w]hether the actual insured is the employer or the ERISA plan, the stop-loss insurance is purchased to 'provide benefits for plans subject to ERISA.'" 833 F.2d at 91, quoting *Metropolitan Life*, 471 U.S. at 738 n. 15.

CONCLUSION AND RELIEF

The petition should be denied because this case is not appropriate for Supreme Court review. There is plainly no conflict among the circuits as to whether ERISA pre-empts state coordination of benefits rules from being applied to uninsured plans. Further, a decision on this issue would have no practical significance, since ERISA plans would be subject to similar rules even under federal law. Finally, the deemer clause issue (the issue which is the basis of the petition for certiorari) would never even be reached in this case, since there are several alternative grounds which fully justify the result below.

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DATE: April 27, 1988